STATE OF MICHIGAN
IN THE SUPREME COURT

STAND UP FOR DEMOCRACY,

Plaintiff-Appellee,

v

SECRETARY OF STATE AND BOARD OF STATE CANVASSERS,

Defendants,

and

CITIZENS FOR FISCAL RESPONSIBILITY,

Intervenor-Defendant-Appellant.
_____/

Supreme Court No. 145387

Court of Appeals No. 310047

SUPPLEMENTAL BRIEF OF GOVERNOR RICHARD SNYDER AND ATTORNEY GENERAL BILL SCHUETTE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

On July 11, 2012, this Court entered an order granting oral argument on the application. In the order, this Court directed the parties to address two issues:

1. Whether plaintiff actually complied with the 14-point type requirement in MCL 168.482(2), specifically given the terms "point" and "type."

   Governor Snyder and Attorney General Schuette answer: No.

   Intervening Defendant answers: No.

   The Michigan Court of Appeals answers: No.

   Plaintiffs' answer: It "substantially" complied.

2. If no, whether substantial compliance with the 14-point type requirement in § 482(2) is sufficient to give plaintiff a clear legal right to certification of the petition.

   Governor Snyder and Attorney General Schuette answer: No.

   Intervening Defendant answers: No.

   The Michigan Court of Appeals answers: No.

   Plaintiffs' answer: Yes.

In addition, Chief Justice Young asked the parties to address the following questions:

1. Whether the "point" measurement of the "type" requires a size measurement of the entire printer's block rather than of the actual character produced by the block.

2. Whether the definitions of "point" and "type" continue to control after the amendment of the statute in 1993 and 1998, notwithstanding the fact that those terms were not redefined in those amendments.

3. Whether the computer font used in this case complies with the original definitions of "point" and "type."

Justice Markman also asked the parties to address the following questions:

1. In addressing the meaning of the terms "point" and "type," what is the significance of the context in which those terms are used.

2. Assuming that the statute requires a size measurement of the entire printer's block, how is such a block to be measured and what are the sizes of the blocks at issue in this case.

3. Assuming that the printer's block is determinative, would a 3-point font be sufficient under the statute as long as the blank space between the two lines is sufficiently large.

4. What legislative purpose would be served by a type-size requirement that measures the size of the printer's block compared to a requirement that measures the size of the actual printed character.

ARGUMENT

I. Plaintiff has not complied with the statute because the type used is not 14/72 of one inch, as required by the statute.

Fundamental canons of statutory interpretation require this Court to discern and give effect to the Legislature's intent as expressed through statutory language. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 281; 696 NW2d 646 (2005). This Court must consider "both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme . . . . If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *People v Gillis*, 474 Mich 105, 114-115; 712 NW2d 419 (2006). Moreover, this Court must "interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage." *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006).

MCL 168.482(2) provides for the size and placement of the headings for each part of a petition:

> If the measure to be submitted proposes a constitutional amendment, initiation of legislation, or referendum of legislation, the heading of each part of the petition shall be prepared in the following form and printed in capital letters in 14-point boldfaced type.

As noted by this Court's order—as well as the questions posed by Chief Justice Young and Justice Markman—this Court must resolve the meaning of the words "point" and "type" based on a statute that was drafted when a letterpress was the primary means of printing official documents. Letterpress printing is done by lining up a number of lead blocks containing letters or other symbols and locking

them in. Ink is then directly applied to the blocks and a sheet of paper is pressed onto it. The letterpress was commonly used in 1954 when the statute was enacted and was still used regularly in the 1970s.[1]

A. A "point" is a measurement of 1/72 of one inch.

The dictionary definition of a "point" as it relates to printing has remained stable for at least 64 years. In 1948 the word "point," in the context of printing, referred to the point system. The word "point system" defines the value of a point as ".013837 inch, or nearly 1/72 inch." *Webster's New International Dictionary of the English Language, Second Edition*, p 1904 (1948). After the statute was enacted, the dictionary defined the value of a "point" as ".013837 inch, or nearly 1/72 inch." *Webster's New Collegiate Dictionary, Second Edition*, p 652 (1960). This would come to be the standard definition of a "point." See *Webster's Third New International Dictionary of the English Language Unabridged*, pp 1749-1750 (1965). Even after the 1993 amendment to the statute, the definition of a "point" remained the same 1/72 of one inch. See *Webster's New World Dictionary, Third College Edition*, p 1043 (1994). The dictionary currently defines a "point" as "a unit of type measurement equal to 0.013835 in (1/72) or 1/12 pica." *Random House Webster's College Dictionary*, p 1021 (2001).

So the word "point" means the same thing today that it meant when the statute was enacted—it is a measurement of 1/72 of one inch. A 14-point letter, then, must measure 14/72 of one inch in order to meet the statutory definition. To

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[1] http://en.wikipedia.org/wiki/Letterpress_printing (accessed July 17, 2012).

answer Chief Justice Young's third question, a Court can determine whether the computer font used in this case complies with that definition by using a printer's ruler, which can be purchased at any printing or craft store.

Plaintiff does not allege that the petition's header was 14/72 of one inch tall. Rather, Plaintiff's expert argues that the font used appeared to be Microsoft's 14-point Calibri font. (4/26/12 Hr'g Tr, p 16, lines 15-24.) But Microsoft's label does not control this case; the actual measurement of the text does. As noted in the initial brief of the *amici*, two experts presented by the Intervening Defendant used a printer's ruler to measure the size of the text used in the heading. And that ruler demonstrated that the petition header's text was not even a 12-point size, much less a 14-point size. (Ex 3 to Campbell Aff, attached as Ex 9 to Def's Challenge to the Form of the Petition).

B. When read in context, the word "type" refers to the actual size of the letter on the printed paper.

As suggested by Chief Justice Young's first question, the definition of "type" is more opaque. The word "type" was defined at the time the statute was written as "a rectangular block, usually of metal or wood, having its face so shaped as to produce in printing a letter [or] [s]uch blocks, or the letters or characters impressed, collectively." *Webster's New International Dictionary of the English Language, Second Edition*, p 2750 (1948). See also *Webster's New Collegiate Dictionary, Second Edition*, p 921 (1960). Another contemporary dictionary defines the word "type" to include both the printer's block and "a printed impression from type:

printed matter." *Webster's Third New International Dictionary of the English Language Unabridged*, p 2476 (1965). Chief Justice Young asked in his second question whether these definitions continue to control following the 1993 and 1998 amendments. But like the definition of the word "point," the definition of "type" remained much the same—although it now includes references to computer printing:

> *a)* A rectangular piece of metal or, esp formerly, wood, with a raised letter figure, etc, in reverse on its upper end which, when inked and pressed against a piece of paper or other material, as in a printing press or on a typewriter, leaves an ink impression of its face; also, such pieces collectively or the characters printed from them; *b)* a character or characters formed electronically and produced by a computer printer.

Random House Webster's College Dictionary, p 1446 (2001). The original definitions still govern. But the question remains whether this Court should adopt the "character size" or "printer's block" definition of "type."

To determine the Legislature's intent, this Court must "tak[e] into account the context in which the words are used." *2000 Baum Family Trust v Babel*, 488 Mich 136, 175; 793 NW2d 633 (2010). As noted in Justice Markman's first question, the statute states that a petition "shall" be printed in "capital letters in 14-point boldface type." The word "in" is a preposition defined in relevant part as "made of." *Random House Webster's College Dictionary*, p 680 (2001). Thus, this Court should construe the statute to require that the letters be "made of" 14-point boldfaced type. In other words, it is the *letters* that shall be printed in 14-point characters.

This is also the only construction that is consistent with the purpose of the statute. When the Legislature enacted the Election Law, it did so to ensure that

citizens who sign petitions are fully aware of what they are signing. *Carman v Hare*, 384 Mich 443, 454; 185 NW2d 1 (1971). But under the "printer's block" definition of type, that purpose could be defeated simply by creating custom blocks that are 14-point in size, but have infinitesimally small characters raised on them. As Justice Markman suggests in his third question, a petition drafter could subvert the statutory purpose simply by placing controversial elements of a petition in a character that is 0.5 point (or 1/144 of one inch), so long as that character is contained in a 14-point block. It cannot be that the Legislature intended to allow unscrupulous petition drafters to render controversial elements completely unreadable simply by custom making printer's blocks.

Justice Markman's second question likewise demonstrates the flaw with "printer's block" definition. There is no answer to the question "how is such a block to be measured" because no printer's block was used in this case. Indeed, no printer's block has likely been used to circulate a petition in the past 35 years. Adoption of the "printer's block" definition would essentially require all petitions to actually be printed on a letterpress—a piece of technology that has not been commonly used for large-scale printing since the 1970s. It cannot be that the Legislature intended that petitions only be printed on letterpress.

Finally, as suggested by Justice Markman's fourth question, using the "printer's block" definition serves *no* Legislative purpose. The Legislature's only interest in promulgating this statute was that citizens were able to clearly see and

understand what they are signing. The size of the printer's block—which no voter will ever see—is not relevant to that purpose.

When viewed in context, then, the word "type" must refer to the characters printed from a printer's block. This definition is consistent with the language of the statute as a whole, which requires the *letters* to be in 14-point, not just the spacing. Moreover, under the "printer's block" definition, drafters could hide controversial language in petitions by creating custom 14-point printer's blocks embossed with small or even undecipherable lettering.

Using a printer's ruler, it is easy to see that the petition's header in this case is not 14-point, whether measured as a fraction of an inch or using the ruler's "E Scale." Under any printer's measure, the heading does not measure "14 points" as the statute requires. And because the statute does not allow for "substantial compliance," the petition cannot be certified for the ballot.

II. Plaintiff is not entitled to mandamus because determining whether a petition has "substantially complied" with the statute is not a ministerial act.

A writ of mandamus is an extraordinary remedy used to enforce duties mandated by law. *State Board of Education v Houghton Lake Community Schools*, 430 Mich 658, 666; 425 NW2d 80 (1988). Before seeking mandamus relief, a plaintiff must demand performance from the officials charged with performing the act it seeks to compel. *Stack v Picard*, 266 Mich 673, 673-674; 249 NW 245 (1934). This occurred when plaintiff sought certification of the petition. Once this threshold is met, the plaintiff must demonstrate: (1) a clear legal right to the act sought to be

compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists. *Baraga Co v State Tax Commission*, 466 Mich 264, 268; 645 NW2d 13 (2003).

Here, the Board of Canvassers' duty is "clear" when the petition strictly complies with the statute. To the extent that a "substantial compliance" doctrine exists, it necessarily requires the Board to exercise judgment. That is, the Board must make a factual determination whether the plaintiff's act of submitting a petition with a header with text less than 14/72 of one inch is "close enough" to allow the petition to be certified despite the failure to strictly comply with the statute. For example, the Board could determine that 12-point type is "close enough" to serve the legislative purpose of ensuring that the voters know what they are signing, but that 11-point type is too small. A future Board could conclude the exact opposite. Either way, the operation of the "substantial compliance" doctrine requires the Board of Canvassers to exercise "judgment or discretion." And though a plaintiff may seek to compel the exercise of discretion through a writ of mandamus, he may not compel the exercise of discretion "in a particular manner." *Houghton Lake Community Schools*, 430 Mich at 666.

As a result, Plaintiff is not entitled to mandamus because the determination of whether a petition "substantially complies" with Michigan's Election Law is not a ministerial act. Rather, the "substantial compliance" doctrine—if it exists at all—

requires the Board to exercise its judgment to determine whether a nonconforming petition is "close enough" to be certified.

CONCLUSION AND RELIEF REQUESTED

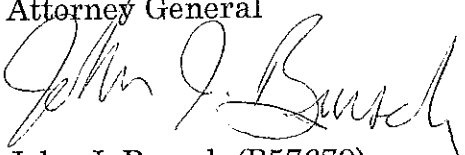
The Board of Canvassers was presented with competing affidavits regarding whether the petition complied with the mandatory language of the statute. The Intervening Defendants presented two experts' affidavits that the headings did not measure 14-point, or 14/72 of one inch on a printer's ruler. Plaintiff countered with an expert who averred that the headings were in Microsoft 14-point Calibri font. Thus, the Board of Canvassers was asked to resolve this factual dispute and, if it was resolved in favor of Plaintiff, to determine whether this Microsoft font "substantially complied" with the requirements of the statute. But mandamus is only appropriate in cases where the Board of Canvassers has a clear legal duty and fails to follow it. Because the Board was asked to use "judgment or discretion" to determine if the petition should be certified, mandamus is not appropriate.

There is no question that the type used in this petition does not meet the requirements of the statute. A point is defined as 1/72 of one inch. A Court can determine whether a petition's headings are printed in 14-point type by measuring them to determine if the letters are 14/72 of one inch tall. If they are not—as is undisputed in the case here—then the petition does not meet the requirements of the statute. The petition's headings do not even meet the more generous "E Scale" standard. Accordingly, Plaintiff's complaint for mandamus necessarily fails.

For all the reasons noted above, Governor Snyder and Attorney General Schuette respectfully request that this Court grant leave to appeal or, alternatively, summarily reverse the Court of Appeals.

Respectfully submitted,

Bill Schuette
Attorney General



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